(2)

FILED

AUG 2 5 1994

OFFICE OF THE CLERK

No. 94-0177

In The

Supreme Court of the United States

October Term, 1994

GREGORY L. BAMFORD, an Individual, and BAMFORD PARTNERSHIP, a Colorado Partnership,

Petitioners,

v.

UPPER REPUBLICAN NATURAL RESOURCES DISTRICT, a Body Politic,

Respondent.

Petition For Writ Of Certiorari To The Nebraska Supreme Court

BRIEF IN OPPOSITION

TERRY E. SAVAGE
420 Broadway
Box 459
Imperial, NE 69033
(308) 882-4348
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Respondent must address Petitioners' No. 3 "Question Presented". That question is better stated:

Whether a governmental subdivision, charged by law to administer a statutory scheme designed to conserve by regulation a valuable natural resource, may include in its regulations a provision requiring users of the resource to consume a specific amount of the resource during a specific time period. And, further, whether once said user has expended its allocation, may the governmental subdivision require the user to cease using the resource pending the granting of another allocation of the resource to the user.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

A. No Taking Has Occurred 3

B. The Nature of the Property Allegedly Taken 5

C. Eminent Domain Protection Does Not Extend to This Case 7

D. Petitioners' Attack is Collateral and an Attempt to Circumvent the Statute of Limitations 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases Cited

Dames & Moore v. Regan, 453 U.S. 654 (1981) 2, 9

Dolan v. City of Tigard, No. 93-518, slip op. (U.S. June 24, 1994) 3

F. Arthur Stone & Sons v. Gibson, 230 Kan. 224, 630 P.2d 1164 (1981) 2, 9

Lucas v. South Carolina Coastal Council, 505 U.S. ___, 112 S.Ct. 2886 (1992) 3

Olson v. City of Wahoo, 124 Neb. 802, 248 N.W. 304 (1933) 5

Pratt v. State Dept. of Natural Resources, 309 N.W. 2d 767 (Minn. 1981) 2, 9

Sorensen v. Lower Niobrara NRD, 221 Neb. 180, 376 N.W.2d 539 (1985) 6

Sporhase v. Nebraska, 102 S.Ct. 346, 73 L.Ed.2d 1254 (1982) 7

State ex rel. Douglas v. Sporhase, 208 Neb. 703, 305 N.W.2d 614 (1981) 7

State ex rel. Douglas v. Sporhase, 213 Neb. 484, 329 N.W.2d 855 (1983) 8

Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 638 P.2d 1324 (1981) 8

Constitutions Cited

Article XV, Section 4, of the Nebraska Constitution 2

Article XV, Section 5, of the Nebraska Constitution 2

TABLE OF AUTHORITIES – Continued

Page

STATUTES CITED

Arizona Ground Water Management Act of 1980 8

Nebraska Ground Water Management and Protection Act, Neb. Rev. Stat. §§ 46-656 to 46-675, 1943 (Reissue of 1988) 10

Neb. Rev. Stat. § 46-613.01, 1943 (Reissue of 1988) 7

Neb. Rev. Stat. §§ 46-638 to 46-650, 1943 (Reissue of 1988) 6

Neb. Rev. Stat. § 46-656, 1943 (Reissue of 1988) 5

Neb. Rev. Stat. §§ 84-901 to 84-920, 1943 (Reissue of 1987) 3

Neb. Rev. Stat. § 84-917 (1990 CUMM. SUPP.) 9

STATEMENT OF THE CASE

This case involves only the question of whether a state, which has never recognized ground water as anything other than public property, may exercise control over that ground water, lying entirely within its own boundaries, by a system of allocations to users thereof. The system provides that ground water users may pump and consume a specific amount of water over or during a specific time period [in this case 75 acre inches per irrigated acre over 5 years] and further provides for cessation of use when the allocation is exhausted or exceeded.

A key factor in the case below, which Petitioners fail to mention in their brief, is the collateral nature of their attack. Petitioners appealed timely only the order of cessation. The two governmental actions which aggrieve them the most, however, occurred in 1977 when a ground water shortage was determined and declared; and in 1988 when they received their last allocation of ground water, which they maintain was inadequate. The statute of limitation on such actions in Nebraska is 30 days.

SUMMARY OF THE ARGUMENT

A. No Taking Has Occurred.

Petitioners admit in their brief that all irrigators with Respondent's jurisdiction received the same allocation of ground water. Petitioners further admit that they "had used all the water allotted to them for the five year allocation period". [Petitioners Brief, page 10]. In fact,

Petitioners had overdrawn their allocation by 12.79 acre inches.

B. The Nature of the Property Allegedly Taken.

Article XV, Section 4 of the Nebraska Constitution declares water for domestic and irrigation purposes to be a natural want. The following Section 5, dedicates the water of every natural stream to the people for beneficial purposes. Ground water has been held to be included in these constitutional provisions. In Nebraska, ground water is not appropriated; the owner of lands overlying the aquifer have only a right to use the ground water on that land for beneficial purposes. Ground water is owned and dedicated to the public, not to private citizens.

C. Eminent Domain Protection Does Not Extend to this Case.

In Nebraska, as stated above, there are constitutional as well as statutory provisions stating that water is the property of the public. The "taking" theory as it pertains to ground water has been rejected in at least two instances where such provisions exist. *F. Arthur Stone & Sons v. Gibson*, 230 Kan. 224, 630 P.2d 1164 (1981) and *Pratt v. State Dept. of Natural Resources*, 309 N.W.2d 767 (Minn. 1981). See also *Dames & Moore v. Regan*, 453 U.S. 654 (1981) in which this Court lent support to the argument that the "taking" protections do not apply where a property right is expressly conditioned on the right of the government to abridge the right, as is the case in Nebraska.

D. Petitioners' Attack is Collateral and an Attempt to Circumvent the Statute of Limitations.

Petitioners' appeal was timely only as it pertains to the cease and desist order issued by the Appellee on March 12, 1992. The designation of the territory encompassing Petitioners' lands as a control area and the adoption of the various rules and regulations of the Respondent, particularly as to the amount of groundwater allocation, were final orders at a much earlier time. Any attempt to review those matters is barred by the statute of limitations set forth in the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920, 1943 (Reissue of 1987). Thirty (30) days after service of the final decision is the only appeal time provided by that Act, or any other provision of law.

ARGUMENT

A. No Taking Has Occurred.

Petitioners appear to rely heavily on two recent decisions of this Court. *Dolan v. City of Tigard*, No. 93-518, slip op. (U.S. June 24, 1994), and *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886 (1992). Both these cases are clearly distinguishable from this case for the reason that Mrs. Dolan and Mr. Lucas were required to give up their property for the perceived public good or welfare without compensation. Petitioners have given up nothing. In fact, at the time they were ordered to stop withdrawing ground water until they received another allocation, they had used 12.79 acre inches per irrigated

acre over their allocation. Petitioners, it is obvious from the record herein, had simply chosen to use their water over a shorter period of time. Nothing has been seized; their land is inviolate; they used considerably more water to raise crops during the first four years of the allocation period than other farmers in the area. They had every opportunity to make productive economic use of their land during 1992 by dry cropping or by availing themselves of United States Department of Agriculture farm program provisions (such as 0-92). They simply chose not to do so.

Petitioners complain that "government must quantify the nature and extent of a ground water shortage and particularize those findings with regard to a specific property owner before taking the owner's right to use ground water." This assertion, were it valid, ignores the record in this case. Extensive modeling of the ground water aquifer and continuous monitoring and measuring of the same throughout the control area, including Petitioners' farm, have occurred. Every year, as required by law, since establishment of the control area Respondent has held public information meetings to disseminate all available hydrologic data pertaining to the control area and it also conducts a public hearing each January at which all ground water users, and others, are invited and urged to participate so that meaningful and effective rules governing ground water use may be adopted, modified or rescinded. Each year a new set of rules, based on the evidence presented at that hearing, is adopted, retained or modified by an order of Respondent which must be approved by the Nebraska Director of Water Resources. Petitioners have never appealed from any such order.

B. The Nature of the Property Allegedly Taken.

In order to address the allegation that an unconstitutional "taking" has occurred, it is necessary to determine the nature of the alleged right taken. Nebraska law pertaining to ground water is well developed. It is clear from an examination of that body of law that Respondent's actions are legal and proper in all respects, and that Petitioners have no "property right" subject to being taken.

The Nebraska Legislature has found ground water to be "one of the most valuable natural resources in the state". Neb. Rev. Stat. § 46-656, 1943 (Reissue of 1988).

The Nebraska Ground Water Management and Protection Act, the law under which Petitioner has taken all its actions relevant to this case, is actually a codification of ground water law in Nebraska from the passage of its Constitution in 1875 to the present time.

In Nebraska ground water is not appropriated; the owner of lands overlying the aquifer have only a right to use the ground water on that land for beneficial purposes. Ground water is owned and dedicated to the public, not to private citizens.

Nebraska has adopted and historically followed the American rule of ground water use. In *Olson v. City of Wahoo*, 124 Neb. 802, 248 N.W. 304 (1933) the rule is stated as:

> The American rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and

> beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the water, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole.

As stated above, the Nebraska Ground Water Management and Protection Act is the law of this State regarding ground water property rights and use rights. Each land owner has only a right to use the water under his land subject to the Act. The Act authorizes and empowers Natural Resources Districts to establish controls, including allocations.

Sorensen v. Lower Niobrara NRD, 221 Neb. 180, 376 N.W.2d 539 (1985), a case cited by Petitioners, deals with damages to a landowner actually deprived of ground water. In that case the Nebraska Court was dealing with the Municipal and Rural Domestic Ground Water Transfers Act, Neb. Rev. Stat. §§ 46-638 to 46-650, 1943 (Reissue of 1988). In that case ground water was sought to be pumped and removed from privately owned lands. The Sorensens were to be actually deprived of the water, it was to be pumped to the surface and transferred off their land and provided to others.

In this case the right to beneficial use is the keystone, and that right has never been accorded the status of a private property right. In fact, it has uniformly been subjected to the public's right to limit usage based on the public's actual ownership of the water. The *Sorensen* court acknowledges:

1. The public may limit or deny the right of private parties to freely use the water, and

2. Ground water use is not an unlimited private property right in Nebraska law. (*Id.* at 190, Nebraska).

C. Eminent Domain Protection Does Not Extend To This Case.

This Court, in dicta, has reviewed and approved the governmental actions complained of by Petitioners. *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981), dealt with a well within the subject control area located on the extreme west boundary of Chase County, Nebraska. In that case the Nebraska Supreme Court reiterated the rule of correlative sharing set out herein. The case was appealed to this Court and part of Neb. Rev. Stat. § 46-613.01, 1943 (Reissue of 1988) was held unconstitutional. That constitutionally defective statute dealt with the transter of water from the well into the State of Colorado without a permit from Nebraska. This Court held that such a requirement by Nebraska violated the Commerce Clause of the Federal Constitution and remanded the case back to the Nebraska Supreme Court to sever the objectionable part of the offending statute. *Sporhase v. Nebraska*, 102 S.Ct. 346, 73 L.Ed.2d 1254 (1982).

The original *Sporhase* case, however, in holdings not disturbed on the appeal, states:

1. Nebraska recognizes only a narrowly circumscribed right of reasonable use of ground water on overlying lands, not an ownership right,

2. The Legislature has the power to determine public policy with regard to ground water, and most importantly,

3. The public may limit or deny the right of private parties to freely use the water when it determines that the welfare of the state and its citizens is at stake. That determination was lawfully made by the Director of Water Resources on August 1, 1977 when the control area was established.

In the case after remand, *State ex rel. Douglas v. Sporhase*, 213 Neb. 484, 329 N.W.2d 855 (1983) the Nebraska court removed the reciprocity requirement as directed by this Court. That Court, however, pointed out that the Supreme Court:

> did not declare illegal the statutory scheme for conservation and preservation of ground water. Rather, on a variety of theories, *the [Supreme] Court approved the general scheme*, e.g., "unexercised federal regulatory power" and "measures taken by a State to conserve and preserve for its own citizens this vital resource in time of severe shortage." *Id.* at 485. (Emphasis supplied.)

The "taking" or inverse condemnation theory regarding water use or rights has been addressed in several other jurisdictions. In *Town of Chino Valley v. City of Prescott*, 131 Ariz. 78, 638 P.2d 1324 (1981) the Arizona Supreme Court rejected a "taking" challenge by ground water users to the Arizona Ground Water Management Act of 1980 on the basis that ground water users did not own ground water until they pumped it up for use and that users were thus not deprived of property.

In some states, as in Nebraska, there are constitutional and statutory provisions stating that water is the property of the public. The "taking" theory has been

rejected in at least two instances where such provisions exist. *F. Arthur Stone & Sons v. Gibson*, 230 Kan. 224, 630 P.2d 1164 (1981) and *Pratt v. State Dept. of Natural Resources*, 309 N.W.2d 767 (Minn. 1981). See also *Dames & Moore v. Regan*, 453 U.S. 654 (1981) in which the Supreme Court lent support to the argument that the "taking" protections do not apply where a property right is expressly conditioned on the right of the government to abridge the right, as is the case in Nebraska.

D. Petitioners' Attack is Primarily Collateral and an Attempt to Circumvent the Statute of Limitations.

This appeal, at all its stages, is timely only as it pertains to the cease and desist order issued by the Respondent on March 12, 1992. The designation of the territory encompassing Petitioners' lands as a control area and the adoption of the various rules and regulations of the Respondent, particularly as to the amount of groundwater allocation, were final orders in 1977 and 1988, respectively. Any attempt to review those matters is barred by the statute of limitations set forth in the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-902 to 84-920, 1943 (Reissue of 1987). Thirty (30) days after service of the final decision is the only appeal time provided by that Act.

According to Neb. Rev. Stat. § 84-917 (1990 CUMM. SUPP), the Petitioners can only have review, on the record made at the formal adjudicatory hearing (Exhibits 5 aka 7, 5A aka 7A, 5B aka 7B) on the following grounds:

1. That the action is a violation of constitutional provisions. This means a violation of Petitioners' constitutional rights pertaining to the issuance of the cease and desist order, not a review of the previous actions of the Director of Water Resources and Respondent in its rule-making capacity. Again, those matters are not timely in this case and review is barred by the statute of limitations.

2. That the action is in excess of the statutory authority, or jurisdiction of the Respondent. There have not been any allegations or pleadings suggesting a lack of jurisdiction of the Respondent. The authority of Respondent is vested in it by two statutes, Neb. Rev. Stat. §§ 46-663 and 46-666, 1943 (Reissue of 1988). Section 46-663 empowers the Respondent to:

a. Adopt and promulgate rules and regulations necessary to discharge its administrative duties. The primary rules pertaining to this function are Rules 11 and 12 of the District and appear in Order No. 14, which is part of the record.

b. Issue cease and desist orders to enforce any of the provisions of the act or of orders issued pursuant to it, and to initiate suits to enforce the provisions of orders issued pursuant to the act. Paragraph b., immediately preceding, appears as paragraph (5) of the statute cited. It is very important to this case. Cease and desist orders carry a clear message; stop! The legislative mandate to stop those not conserving ground water could not be more clear. The Respondent has done nothing more, or

nothing less, than fulfill the very function given to it by the Nebraska legislature.

CONCLUSION

In 1977, after extensive scientific investigation and a public hearing process the Nebraska Director of Water Resources found the supply of ground water in the control area to be inadequate. Fifteen years ago the Respondent began allocating ground water within its jurisdiction. In 1988 the Petitioners, who had received allocations for earlier periods, received 75 acre inches per irrigated acre for the crop years 1988 to 1992, as did every other irrigator in the control area. They used it all, and then some, and were not allowed to irrigate during 1992.

The next year Petitioners were entitled to, and did receive a new allocation, less their overdraw. They have received the same allocation as all other irrigators in the control area who have operated the same length of time as they have.

Petitioners' claim of constitutional deprivation are totally without merit. This case presents no substantial federal question. It deals with a completely local issue and is actually moot at this time.

The petition for writ of certiorari should be denied.

Respectfully submitted,

Upper Republican Natural
Resources District,
Respondent,
TERRY E. SAVAGE, Its Attorney
420 Broadway
Box 459
Imperial, Ne. 69033
(308) 882-4348
Counsel of Record